

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL J. BERRY and U.S. POSTAL SERVICE,  
POST OFFICE, Los Angeles, CA

*Docket No. 02-331; Submitted on the Record;  
Issued July 23, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The case is on appeal to the Board for the second time.<sup>1</sup> In the first appeal, the Board affirmed the Office's May 7, 1998 decision, in which the Office determined that appellant being shot while on duty during work hours was not in the performance of duty because the evidence established that appellant had a personal association with his assailant and there was no indication that the assault was the result of a work activity or aggravated by work association. The Board found that the Office properly determined that the assault was imported into the employment from a private relationship and was therefore not compensable.

By letter dated August 31, 2001, appellant requested reconsideration of the Office's decision and submitted an Indictment by a grand jury in the United States District Court for the Central District of CA in February 2001 in which the defendant was charged pursuant to 18 U.S.C. § 1114 with attempting to kill appellant on or around March 7, 1997 while appellant "was engaged in the performance of his official duties as a letter carrier" for the employing establishment. 18 U.S.C. § 1114 states that "[w]ho ever kills or attempts to kill any officer or employee of the United States ... while such officer or employee is engaged in or on account of the performance of official duties ... shall be punished."

By decision dated September 17, 2001, the Office denied appellant's request for reconsideration, stating that appellant's letter requesting reconsideration dated August 31, 2001 which was filed more than a year after the Office's May 7, 1998 decision was untimely, and appellant did not show clear evidence of error.

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<sup>1</sup> Docket No. 99-93 (issued May 11, 2000). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

The Board finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed the appeal with the Board on December 18, 2001, the only decision before the Board is the Office's September 17, 2001 decision, denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</sup> The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of the last merit decision.<sup>4</sup> Appellant by letter dated August 31, 2001 requested reconsideration. The last merit decision was dated May 11, 2000. Appellant's request for reconsideration was filed more than one year after the date of the last merit decision and was therefore untimely. The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision.

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>6</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed as to produce a contrary conclusion.<sup>8</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>9</sup> The application must establish, on its face, that such decision was erroneous.<sup>10</sup>

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<sup>2</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607(a). *See also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> *Willie J. Hamilton*, 52 ECAB \_\_\_\_ (Docket No. 00-1468, issued June 5, 2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>6</sup> *Willie J. Hamilton*, *supra* note 5; *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>7</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>8</sup> *Leona N. Travis*, *supra* note 5.

<sup>9</sup> *Willie J. Hamilton*, *supra* note 5.

<sup>10</sup> 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

In this case, the federal grand jury indictment in February 2001 charging the defendant with attempting to kill appellant while he was in the performance of duty is not determinative on whether appellant was injured in the performance of duty under the Federal Employees' Compensation Act.<sup>11</sup> Appellant has not shown that the assault on him was other than the result of personal relations imported into the employment situation and was not caused or aggravated by his work or his association with work. He therefore did not meet the criteria under the Act to establish that he was injured in the performance of duty.<sup>12</sup> Appellant failed to demonstrate clear evidence of error in the Office's decision and the Office properly denied appellant's reconsideration request.

The September 17, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
July 23, 2002

Alec J. Koromilas  
Member

Colleen Duffy Kiko  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> See *Daniel Deparini*, 44 ECAB 657, 660 (1993); *Anneliese Ross*, 42 ECAB 371, 375 (1991).

<sup>12</sup> See *Valeria Minus*, 46 ECAB 799, 803 (1995).